

OCT 18 2010

JAMES N. HATTEN, Clerk
By: *Seewill*
Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

BRENDA G. BROWN, :
Movant, :
: CRIMINAL ACTION NO.
v. : 1:04-~~CR~~-224-TWT-GGB-2
: *CR*
UNITED STATES OF AMERICA, :
Respondent. :
:

ORDER AND OPINION

Movant pled guilty to multiple felonies in this case, and the Court sentenced her on June 29, 2005. Movant's sentence included \$11,089,686.23 in restitution. On March 13, 2007, the Court denied Movant's collateral challenge to her conviction and sentence under 28 U.S.C. § 2255, and the Eleventh Circuit affirmed that denial on March 11, 2008. Movant now has filed a motion to vacate restitution order (Docs. 509 & 527) and a motion for modification or reduction of sentence (Doc. 523).¹

In her motion to vacate restitution, Movant argues that the Court entered its restitution order too late. Thus, she contends that the restitution component of her sentence must be vacated.

¹ Movant filed her motion to vacate restitution order twice, and both motions are identical. (Docs. 509 & 527.) The Clerk docketed the first filing as a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. (Doc. 509.)

There is no basis upon which the Court can vacate the restitution component of Movant's sentence. A motion under 28 U.S.C. § 2255 "cannot be utilized by a federal prisoner who challenges only the restitution portion of [her] sentence because § 2255 affords relief only to those prisoners who claim the right to be released from custody." *Blaik v. United States*, 161 F.3d 1341, 1343 (11th Cir. 1998) (internal quotations omitted); *see also Mamone v. United States*, 559 F.3d 1209, 1211 (11th Cir. 2009) (per curiam) (holding that federal prisoners cannot challenge restitution orders under § 2255 even if they also challenge custody via other claims). Even if Movant could pursue her challenge under § 2255, she first would have to obtain permission from the Eleventh Circuit because she has already filed a § 2255 motion that the Court denied. *See* 28 U.S.C. § 2255(h).

Nor can Movant obtain a writ of habeas corpus under 28 U.S.C. § 2241 regarding the restitution component of her sentence. The writ of habeas corpus is available only to a person in custody in violation of the Constitution or federal law, and a challenge to restitution is not a challenge to custody. *See* 28 U.S.C. § 2241(c)(3); *Hensley v. Mun. Court*, 411 U.S. 345, 345, 351 (1973) (defining "in custody" within the meaning of the federal habeas corpus statute); *Duvallon v. Florida*, 691 F.2d 483, 485 (11th Cir. 1982) (reasoning that a fine does not restrain

one's liberty and, thus, does not constitute custody).² Relying on this authority, federal courts in this circuit have rejected collateral challenges, like Movant's, to restitution. *See, e.g., Blaik*, 161 F.3d at 1343; *Austin v. United States*, No. 2:07-CV-616-FTM-29DNF, 2009 WL 377215, at *1-*2 (M.D. Fla. Feb. 12, 2009) (holding that challenge to only restitution could not be brought under § 2241 or § 2255); *Duffy v. Grayer*, No. 1:08-CV-476-TCB-ECS (N.D. Ga. Aug. 12, 2008) (same).

Accordingly, Movant's motion to vacate restitution order (Docs. 509 & 527) is **DENIED**. As for Movant's motion for modification or reduction of sentence (Doc. 523), the Court **DIRECTS** the Government to file a response to the motion within thirty (30) days of the date this Order is entered.

SO ORDERED this 15 day of October, 2010.

Thomas W. Thrash
THOMAS W. THRASH, JR.
UNITED STATES DISTRICT JUDGE

² The court in *Duvallon* held that a person subject to a state judgment imposing only a monetary fine is not "in custody" under 28 U.S.C. § 2254. 691 F.2d at 485. The same result applies to § 2241's "in custody" requirement. *See Medberry v. Crosby*, 351 F.3d 1049, 1059 (11th Cir. 2003) ("Section 2254 . . . applies to 'a person in custody pursuant to the judgment of a State court' who is 'in custody in violation of the Constitution or laws or treaties of the United States'" under § 2241).